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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 483.

CLIFFORD F. MacEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

AGAINST

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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General Statement.

This action involves only a simple question of construction of the Miller Act (49 Stat. at L. 793, 794, 40 USCA §270a-d) in deciding which the Circuit Court of Appeals for the Third Circuit has followed the decisions of this Court construing the Miller Act and the earlier Heard Act (28 Stat. at L. 278, 33 Stat. at L. 811, 36 Stat. at L. 1167, 40 USCA §270). The question arose on petitioners' motion to dismiss the complaint for failure to state a valid cause of action. The opinion of the Circuit Court of Appeals is reported in 137 F. 2d 565.

There is no conflict between the decision of the Circuit Court of Appeals herein and any decision of this Court or of another Circuit Court of Appeals.

Although the right of claimants situated like plaintiff herein to recover on the bond under the Miller Act has not been passed upon by this Court, this Court has held that claimants situated like plaintiff might recover on the bond under the Heard Act, for which the broader and more liberal Miller Act was substituted in 1935.

Summary Statement of Facts.

The allegations of the complaint, which are to be taken as proved on the motion to dismiss, show that petitioner Clifford F. MacEvoy Company (MacEvoy) made a contract with the United States of America, represented by the Federal Works Administrator, under which MacAvoy agreed to furnish the materials and perform the work necessary for the construction of 700 dwelling-units in a housing project (R. 3-4).

Pursuant to the Miller Act, MacEvoy, as principal, and petitioner, The Aetna Casualty and Surety Company (Surety), as surety, furnished a bond conditioned for the prompt payment of all persons supplying labor and material in the prosecution of the work provided for in MacEvoy's contract (R. 4).

MacEvoy thereafter contracted with James H. Miller & Company (Miller Company) to furnish building materials for the prosecution of the work provided for in MacEvoy's contract (R. 5).

The Miller Company, in turn, contracted with the use plaintiff, The Calvin Tomkins Company, to furnish certain building materials for the prosecution of the work (R. 5).

Plaintiff, with the knowledge, consent and approval of MacEvoy, furnished $47,119.14 of building materials

through the Miller Company for the prosecution of the work. Plaintiff received from the Miller Company $35,085.65 on account, leaving a balance of $12,033.49 with interest owing (R. 5).

When the Miller Company failed to pay plaintiff the balance, plaintiff duly notified MacEvoy and the Surety and thereafter duly brought this action (R. 6).

Issue Decided by the Circuit Court of Appeals.

The Circuit Court of Appeals held that plaintiff might recover from MacEvoy, the contractor, and the Surety on the Miller Act bond for materials furnished by plaintiff in the prosecution of public work through the Miller Company which had contracted with MacEvoy to furnish the materials.

POINT I.

The decision of the Circuit Court of Appeals herein is in accord with the provisions of the Miller Act and decisions of this Court construing the Miller Act and the earlier Heard Act.

The decision of the Circuit Court of Appeals herein is in accord with the language of the Miller Act. The first section of the Act, 270a, requires the contractor on a public building or a public work of the United States to furnish "a payment bond with a surety • • • for the protection of *all persons* supplying labor and material in the prosecution of the work provided for in said contract for the use of *each such person*" (Subdivision [a][2]; italics supplied).

The second section (270b) provides in part that "*Every person* who has furnished labor or material in the prosecution of the work provided for in such contract, in re-

spect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him" (Subdivision [a]; italics supplied).

The third section (270c) provides that *any person* who has supplied labor or materials for such work and who has not been paid may, upon making an affidavit to that effect, obtain a certified copy of the bond of the contractor and the contract for which the bond was given. (Italics supplied.)

The fourth section (270d) defines certain terms used in the Act.

The fifth section provides for the repeal of the Heard Act.

In the foregoing provisions from the several sections of the Miller Act, there is no limitation whatever placed on the persons who may recover on the contractor's bond except that they must be persons who have "furnished labor or material in the prosecution of the work".

The Circuit Court of Appeals, therefore, properly held that plaintiff, which furnished materials in the prosecution of public work, was entitled to recover under the provisions of the Miller Act.

Petitioners, however, argue that the proviso in Section 2 of the Act relating to notice amounts to an amendment of the other provisions of the Act so as to make them read, in effect, that only those persons who furnish

labor or materials to a contractor or subcontractor may recover on the bond.

The Circuit Court of Appeals, in holding that a subsidiary provision of the Miller Act should be construed so as not to obstruct and restrict the general purpose of the Act as expressed in its title and throughout its provisions, is in accord with the decision of this Court in *United States of America for the Use and Benefit of Alexander Bryant Company* v. *New York Steam Fitting Company*, 235 U. S. 327, 59 L. ed. 253 (1914) where this Court approved a similar construction of a similar proviso of the Heard Act by the Circuit Court of Appeals for the Third Circuit in *Vermont Marble Co.* v. *National Surety Co.*, 213 Fed. 429.

The Circuit Court of Appeals properly held that, even if the proviso in Section 2 were construed so as to amend the main provisions of the Act so as to limit recovery to persons furnishing materials to a contractor or subcontractor, plaintiff herein was entitled to recover for the reason that the Miller Company, through which plaintiff furnished the materials, having contracted with the contractor, was a subcontractor. In so holding, the Circuit Court of Appeals is in accord with this Court, which, in a case construing the Heard Act, used the word "subcontractor" several times in its opinion in referring to a company which had contracted with the contractor to supply bricks.

> *United States Fidelity & Guaranty Company* v. *United States for the Use and Benefit of Golden Pressed & Fire Brick Company*, 191 U. S. 416, 48 L. ed. 242 (1903).

Moreover, the Surety in this action, which was also the petitioner surety in an application to this Court for a writ of certiorari in *Utah Construction Company* v. *United*

States, 273 U. S. 745, 71 L. ed. 870 (1926), admitted in its petition in that case that a contract to furnish materials, such as the Miller Company had with MacEvoy, is sometimes called a "subcontract" (p. 7).

Thus, the decision of the Circuit Court of Appeals herein is in accord with the provisions of the Miller Act; and it is in accord with the Act even if it be deemed amended by the proviso in Section 2, as petitioners contend it should be.

The decision of the Circuit Court of Appeals herein is in accord with the decisions of this Court construing the Heard Act.

> *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 203, 204, 50 L. ed. 437, 440, 441 (1906);
> *Illinois Surety Company* v. *John Davis Company*, 244 U. S. 376, 380, 61 L. ed. 1206, 1211 (1917);
> *Fleischmann Construction Company* v. *United States of America to the Use of Forsberg*, 270 U. S. 349, 360, 70 L. ed. 624, 631 (1926);
> *Standard Accident Insurance Company* v. *United States to the Use of Powell*, 302 U. S. 442, 444, 82 L. ed. 350, 352 (1938).

This Court summed up its attitude with reference to the right of recovery under the Heard Act as follows in *Illinois Surety Company* v. *John Davis Company*, *supra*:

> "In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act" (pp. 380; 1211).

This Court said that in the construction of the obligation of the bond given pursuant to the Heard Act:

> "we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end;"
>
> *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 203, 50 L. ed. 437, 440 (1906), *supra*.

The Heard Act was less liberal in its provisions than the Miller Act. The Heard Act allowed persons furnishing labor or materials to the *contractor* in the prosecution of public work to recover on the contractor's bond. The Miller Act, which was substituted for the Heard Act, permits *all* persons furnishing labor or materials in the prosecution of public work to recover. Thus, what this Court has said with respect to the right of recovery on the bond under the Heard Act would apply with even greater force to the right of recovery on the bond under the substituted Miller Act.

The decision of the Circuit Court of Appeals herein is in accord with decisions of this Court construing the Miller Act. This Court has said recently that the Miller Act is a substitute for the earlier Heard Act and, therefore, was intended to be highly remedial and must be liberally construed.

> *Fleisher Engineering & Construction Company* v. *United States*, 311 U. S. 15, 17, 85 L. ed. 12, 14 (1940).

In another recent decision construing the Miller Act, this Court said that the Miller Act enlarges the protec-

tion given to materialmen and laborers under the earlier Heard Act.

> *United States to the Use of Noland Company, Inc.* v. *Irwin*, 316 U. S. 23, 29, 86 L. ed. 1241, 1245 (1942).

In a footnote to the opinion of this Court in *United States to the Use of Noland Company, Inc.* v. *Irwin, supra*, reference is made to Congressional hearings on the several bills from which the Miller Act evolved. In the course of these hearings, Senator Burke, in the final discussion in the Senate stated without contradiction the purpose of the Miller Act as follows:

> "Mr. President, this bill proposes to amend what is known as the 'Heard Law'. • • • This bill would amend that law by requiring an additional bond, a payment bond, for the protection of material men and laborers, subcontractors, and *all who put forth their labor or furnish materials or incur expenditures in connection with the work.*" (Italics supplied.)
>
> *Vol. 79 Congressional Record*, Part 12, page 13382, Senate proceedings, 74th Congress, 1st Session (H. R. 8519).

The decision of the Circuit Court of Appeals herein, therefore, is in accord with the provisions of the Miller Act, the decisions of this Court construing the Heard Act and the decisions of this Court construing the Miller Act.

POINT II.

There is no conflict between the decision of the Circuit Court of Appeals herein and any decision of this Court or of another Circuit Court of Appeals or of the Court of Appeals for the District of Columbia.

There is no conflict between the decision of the Circuit Court of Appeals herein and the decisions of this Court construing the Miller Act or the earlier Heard Act.

United States for the Use of Hill v. *American Surety Company*, 200 U. S. 197, 50 L. ed. 437 (1906), *supra;*

Illinois Surety Company v. *John Davis Company*, 244 U. S. 376, 61 L. ed. 1206 (1917), *supra;*

Fleischmann Construction Company v. *United States of America to the Use of Forsberg*, 270 U. S. 349, 70 L. ed. 624 (1926), *supra;*

Standard Accident Insurance Company v. *United States to the Use of Powell*, 302 U. S. 442, 444, 82 L. ed. 350, 352 (1938), *supra;*

Fleischer Engineering & Construction Company v. *United States*, 311 U. S. 15, 85 L. ed. 12 (1940), *supra;*

United States to the Use of Noland Company, Inc. v. *Irwin*, 316 U. S. 23, 86 L. ed. 1241 (1942), *supra.*

There is no conflict between the decision of the Circuit Court of Appeals herein and any decision of another Circuit Court of Appeals. On the contrary, in *Utah Construction Company* v. *United States*, 15 F. 2d 21, certiorari denied 273 U. S. 745, 71 L. ed. 870 (1926), *supra*, the Circuit Court of Appeals for the Ninth Circuit went much further in allowing a recovery under the Heard Act than the Circuit Court of Appeals for the Third Circuit did in

this case in allowing a recovery under the Miller Act. The Court there permitted the recovery by a materialman who supplied materials to the vendor of materials to a subcontractor.

The defendant surety in that case, which is also the petitioner Surety herein, complained to this Court in its petition for a writ of certiorari that "The decision in effect wholly disregards the word 'contractor' implied in the phrase 'supplying *him* with labor or material'" (p. 8), referring to the language of the Heard Act. This Court, however, apparently found nothing in the decision of the Circuit Court of Appeals for the Ninth Circuit in that case, which was in conflict with its own decisions construing the Heard Act.

The decision of the Circuit Court of Appeals herein is not in conflict with the decision of the United States Court of Appeals for the District of Columbia in *Continental Casualty Company* v. *North American Cement Corporation*, 91 F. 2d 307 (1937). The Court of Appeals for the District of Columbia held that the claimant in that case had supplied materials in the prosecution of public work under an agreement with the contractor to pay for those materials.

The Court of Appeals for the District of Columbia, in a dictum, indicated that, in construing the local statute of the District of Columbia, it would not go as far as this Court indicated it would go in construing the Heard Act, *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 50 L. ed. 437 (1906), *supra*, or as far as the Circuit Court of Appeals for the Ninth Circuit actually did go in construing the Heard Act in *Utah Construction Company* v. *United States*, 15 F. 2d 21 (1926), certiorari denied, 273 U. S. 745, 71 L. ed. 870, *supra*.

The only conflict indicated is a possible *future* conflict between this Court and the Court of Appeals for the Dis-

trict of Columbia as to what would be the proper decision in a case involving facts which were not involved either in the case before the Court of Appeals for the District of Columbia or in the present case.

There is no conflict between the decision of the Circuit Court of Appeals for the Ninth Circuit in *Utah Construction Company* v. *United States, supra,* and the decision of the Court of Appeals for the District of Columbia in *Continental Casualty Company* v. *North American Cement Corporation, supra.* Because of differences in the facts, the Court of Appeals for the District of Columbia itself stated that the questions before the Court in *Utah Construction Company* v. *United States, supra,* were academic so far as the case before the Court of Appeals for the District of Columbia was concerned (p. 309).

In every case arising under the Heard Act, recovery has been allowed to a claimant situated like plaintiff herein. There are no conflicting decisions or even conflicting dicta with respect to the right of recovery of such claimants.

POINT III.

Petitioners' argument that the decision of the Circuit Court of Appeals, allowing a claimant in the position of plaintiff to recover, would impose undue burden on a surety and would be contrary to the public interest, has no basis in fact in this case. Similar arguments have been considered and rejected by this Court.

Petitioners contend that the decision of the Circuit Court of Appeals in this case "opens the door to suits upon the payment bond by an indeterminable class of claimants" (p. 23). They fear that "the most remote claimants who may have contributed work or materials to some part of the completed project, even though such

contribution may have been in the manufacture or mining of materials many miles from the site and passing through the hands of numerous persons, such as miners, manufacturers, distributors, supply men, jobbers, vendors and materialmen before final incorporation in the work" (Brief, p. 24), may be permitted to recover on the contractor's bond as a result of the decision in this case.

The decision of the Circuit Court of Appeals in this case merely held that a claimant who supplies materials to a person who has contracted to furnish those materials to the contractor may recover on the bond.

The Court did not hold that persons having the remote relationships suggested by petitioners in their brief might recover on the bond.

The decision, therefore, does not raise any question as to whether the public interest is adversely affected by allowing remote claimants to recover, and petitioners' arguments in that connection are, therefore, beside the point.

In *Utah Construction Company* v. *United States*, 15 F. 2d 21, certiorari denied, 273 U. S. 745, 71 L. ed. 870 (1926), *supra*, the Circuit Court of Appeals for the Ninth Circuit allowed more remote claimants to recover on a bond under the Heard Act. The Surety herein argued to this Court in its petition for a writ of ceritiorari and in its brief in support thereof in that case that the decision of the Circuit Court of Appeals permitting a materialman who supplied materials to the vendor of materials to a subcontractor to recover would result in increased premiums on bonds and consequent increased cost to the Government and undue hardship on sureties. The Surety said:

> "If the view of the Circuit Court of Appeals (in the *Utah Construction Company* case) is correct it must necessarily follow that a contractor could not, in safety, so much as purchase a keg of nails and

pay for it without first satisfying himself at his own risk that the drayman who hauled it to the job of the vendor had been paid for his services, and that the wholesaler from whom the vendor purchased it had likewise been paid.

The application of such a rule to public contracts would be a novel thing and would involve such contractors in innumerable difficulties and disputes and might conceivably embarrass the government in inducing anyone to accept a contract for a public work."

Brief in support of petition for writ of ceriorari, pages 26-7, *Utah Construction Company* v. *United States*, 273 U. S. 745, L. ed. 870 (1926) *supra*.

This Court, after careful consideration of the arguments, denied the petition for a writ of certiorari in the *Utah Construction Company* case involving the Heard Act. The same Surety advances the same arguments in its present petition for a writ of certiorari.

The arguments have even less merit in the present case where the Circuit Court of Appeals for the Third Circuit did not go as far as the Circuit Court of Appeals for the Ninth Circuit did in the *Utah Construction Company* case, although the Act involved in the present case was not the Heard Act, but the broader and more liberal Miller Act.

The argument that a liberal construction of the Heard Act would impose undue hardship on the surety was addressed to this Court in *United States for the Use of Hill* v. *American Surety Co.*, 200 U. S. 197, 50 L. ed. 437 (1906), *supra*, and answered thus:

"It is easy for the contractor to see to it that he and his surety are secured against loss by requiring

those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnish work or labor to go into the structure" (pp. 204; 441).

To the same effect is the later decision of this Court in *Mankin* v. *United States to the Use of Ludowici Celadon Co.*, 215 U. S. 533, 540, 54 L. ed. 315, 318 (1910).

Thus, petitioners' arguments respecting the public interest and undue hardship have been raised, considered and rejected by this Court in cases construing the Heard Act for which the Miller Act was substituted.

CONCLUSION.

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

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